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NO. 83-955

In the Supreme Court of the United States

October Term, 1983

UNITED GARMENT MANUFACTURING COMPANY, LTD.,

Petitioner,

vs.

TELINA NELSON, a minor, by CINDRA R. CARSON, Guardian ad Litem, GERALD NELSON, SHERRY NELSON, F.W. WOOLWORTH COMPANY and TRAVELERS INSURANCE COMPANY,

Respondents.

On Petition For a Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where a Hong Kong corporate manufacturer fabricated textile goods with complete knowledge and expectation that these goods were destined for the United States market, does an exercise of personal jurisdiction over that manufacturer in a state where one of those products caused injury violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

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WISCONSIN LONG ARM STATUTE

[Laws of 1977]

801.05 *Personal jurisdiction, grounds for generally.* A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to s. 801.11 under any of the following circumstances:

* * *

(4) *Local Injury; Foreign Act.* In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:

* * *

(b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT XIV (Ratified July 9, 1868)

SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NO. 83-955

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TELINA NELSON, a minor, by CINDRA R. CARSON, Guardian ad Litem, GERALD NELSON, SHERRY NELSON, F.W. WOOLWORTH COMPANY and TRAVELERS INSURANCE COMPANY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF CASE

In 1973 United Garment Manufacturing Company, Ltd. (hereinafter United Garment) of Hong Kong, through Bunnan Tong & Company, Ltd. (hereinafter Bunnan Tong), a Hong Kong broker, became the exclusive manufacturer of all 100% cotton flannel shirts purchased by the F.W. Woolworth Company of the United States (hereinafter Woolworth) for the import into the United States. (A 14-16). United Garment continued to manufacture all of the boys' 100% cotton flannel shirts for the F.W. Woolworth Company of the

United States from 1973 through 1977.[1] During these years, the Buyer of Men's Shirts for the F.W. Woolworth Company of the United States made annual visits to the premises of United Garment and had personal dealings with one of its directors, Peter Choi For Wing. (A 14-15).

Pursuant to arrangements through Bunnan Tong, all shirts that United Garment manufactured for F.W. Woolworth of the United States were retailed in the United States under the "Topsall" label. United Garment manufactured this label as well as the shirts and at all times Peter Choi For Wing was fully aware that those shirts his company manufactured under the "Topsall" label would be imported into the United States and sold at Woolworth's retail outlets to American consumers throughout the United States. Additionally, during the years that United Garment manufactured shirts under the "Topsall" label for Woolworth, United Garment also manufactured shirts under labels for other American distributors and retailers, including Mens' Wear International, a division of Van Heusen, and Montgomery Ward. (A 15).

Pursuant to an order placed by Woolworth to Bunnan Tong, in 1977 United Garment manufactured 4,300 dozen boy's 100% cotton flannel shirts under the "Topsall" label for Woolworth of the United States. These were labeled and packaged at United Garment's manufacturing facility in Hong Kong and then shipped by Woolworth to the United States for retail distribution. (A 8).

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[1] Due to the nature of the labor market in the textile industry, 85% to 90% of all 100% cotton flannel shirts sold in the United States since 1972 have been manufactured outside of the United States.

During the months preceding Christmas of 1977, the plaintiff's mother, Sherry Nelson, purchased one of those shirts manufactured for Woolworth's of the United States by United Garment under the "Topsall" label from a display containing several of the shirts in a Woolworth store in Rice Lake, Wisconsin. The minor plaintiff, Telina Nelson, was given one of the "Topsall" cotton flannel shirts for Christmas of 1977 by her mother. (A 1-6). Telina Nelson's cause of action arose when this shirt came into contact with an open flame from a Park Industries, Inc. butane cigarette lighter. This caused the "Topsall" shirt to ignite, inflicting horrific and permanently disabling injuries.

On September 14, 1981, by her guardian ad litem, Telina Nelson filed a diversity action against the F.W. Woolworth Company,[2] The Travelers Insurance Company[3] and the manufacturer of the butane lighter, Park

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[2] The F.W. Woolworth Company has no parent company, no subsidiaries other than wholly-owned subsidiaries and no affiliates.

[3] The Travelers Insurance Company is an insurer of Woolworth. It is a wholly-owned subsidiary of The Travelers Corporation. The Travelers Insurance Company has no subsidiaries or affiliates of its own. The Travelers Corporation, however, has the following wholly-owned subsidiaries which may be considered affiliates to The Travelers Insurance Company: The Charter Oak Fire Company; Constitution Plaza, Inc.; Derby Advertising, Inc.; Keystone Custodian Funds, Inc.; The Massachusetts Companies, Inc.; The Phoenix Insurance Company; The Plaza Corporation; The Prospect Company; Travelers Equities Sales, Inc.; The Travelers Indemnity Company of America; The Travelers Indemnity Company; The Travelers Indemnity Company of Illinois; The Travelers Indemnity Company of Rhode Island; The Travelers Insurance Company of Illinois; The Travelers Investment Management Company; The Travelers Life and Annuity Company; The Travelers Life Insurance Company and The Travelers Marine Corporation.

Industries, Inc. Her Complaint was amended on June 2, 1982 adding Bunnan Tong & Company, Ltd. and United Garment Manufacturing Company, Ltd. as defendants. On January 14, 1983 however, although finding that a basis for jurisdiction existed under Wisconsin's long arm statute, the District Court entered an Order dismissing United Garment from the action holding that an exercise of that long arm jurisdiction would violate the Due Process Clause to the Fourteenth Amendment of the United States Constitution.

Woolworth and Travelers then moved the Court to direct the entry of final judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure. This motion was denied by the District Court on February 1, 1983. On February 3, 1983, Woolworth filed a Notice of Appeal. Despite the expressed position of the plaintiff in support of Woolworth's action, the District Court on February 3rd also issued an Order to its Clerk preventing transmittal of the record to the Seventh Circuit. The District Court noted in this Order: ". . . nor does this Court endorse such an appeal under 28 U.S.C. 1292(b) . . ." Despite the stated position of the parties (with the exception of Bunnan Tong and United Garment) that forcing this case to trial would be extremely and irreparably damaging to the plaintiff, her parents and Woolworth, very wasteful of financial, human and judicial resources while working a great injustice to all concerned, the Court noted further in its Order that: "If requested, a stay pending appeal would be denied by this Court."

Subsequently, and after a review of the entire course of proceedings below, the Seventh Circuit on April 7, 1983, exercised its appellate jurisdiction and issued a stay to the District Court pending appeal. This Order was predicated upon an express finding that the circumstances of the instant case fit squarely within the narrow-

ly defined and limited criteria necessary for an application of the United States Supreme Court's holding in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964).

The District Court's January 14th Order dismissing United Garment was reversed by the United States Court of Appeals for the Seventh Circuit on September 16, 1983,[4] and United Garment has petitioned the Supreme Court of the United States to review the decision of the Seventh Circuit.

SUMMARY OF ARGUMENT

The Petitioner in its brief seeks principally to remake the record which was established in the District Court. It fails to demonstrate conflicts among the courts of appeals pursuant to Supreme Court Rule 17(a) or significant questions of federal law which have not been but should be ruled upon by the Court pursuant to Supreme Court Rule 17(c). Under the record in the instant case, there is no conflict between the opinion of the Seventh Circuit and any applicable decision of the United States Supreme Court.

The Petitioner also seeks review of a Seventh Circuit Order dated April 7, 1983. Under Supreme Court Rule 20, the petition in this regard is not timely and should not be considered. Nevertheless, the Petitioner fails to demonstrate that the Circuit Court's April 7th Order conflicts with decisions of other courts of appeals on the same matter or is in conflict with applicable decisions of the United States Supreme Court.

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[4] The decision of the Seventh Circuit is reported in the Federal Reporter as *Nelson by Carson v. Park Industries, Inc.*, 717 F.2d 1120 (7th Cir. 1983).

ARGUMENT

In its brief, United Garment has materially distorted those portions of the record which were pertinent to the decision of the Seventh Circuit. It has then used this distorted version of the record from which to argue that the Court of Appeals for the Seventh Circuit incorrectly decided the issue of personal jurisdiction.

These material distortions are found throughout the Petitioner's Brief. United Garment states that "the Court of Appeals reversed . . . because United Garment had placed its goods in the stream of commerce while aware that Woolworth would be the ultimate retail distributor and that Woolworth had retail stores throughout the world, including the United States." (Petitioner's Brief at 3). This was not the Court's basis for its reversal of the District Court. The salient and controlling fact in the Seventh Circuit was United Garment's undisputed knowledge and expectation that all the textile products they manufactured with the "Topsall" label for the F.W. Woolworth Company of the United States would be imported into the United States and sold at Woolworth retail outlets throughout the United States. 717 F.2d at 1126, 1127.

Nor is it true or reflected in the record that "United Garment had no role and had no contact whatsoever with Woolworth in the transaction." *Compare* (Petitioner's Brief at 3) *with* 717 F.2d at 1127. Moreover, omitted is the fact that for a period of five years United Garment manufactured all of the 100% boys' cotton flannel shirts sold by Woolworth in the United States. Instead, it is stated that United Garment filled a single order for Bunnan Tong knowing only that the same would be retailed worldwide by Woolworth.

There can be little dispute over the proposition that from their sale of 4,300 dozen boy's shirts intended for national distribution in the United States, United Garment received a substantial financial benefit. 717 F.2d at 1127. The Petitioner's portrayal of their transaction with Bunnan Tong as a blind sale of goods with only possible awareness that their product would be distributed throughout a worldwide market that included the United States is blatantly misleading. Equally misleading is United Garment's contention that the Court of Appeals found jurisdiction solely on the basis of this "awareness".

United Garment's principal contention appears to be that, under Supreme Court Rule 17(a), the Seventh Circuit's opinion is in conflict with decisions from other courts of appeals on the same issue. The petitioner also contends that the opinion of the Seventh Circuit is in conflict with the opinion of the United States Supreme Court in *World-Wide Volkswagen Corp. v. Woodsen,* 444 U.S. 286 (1980). Neither of their contentions is true. The decision over which United Garment seeks review shows that jurisdiction was found based upon the approval in *World-Wide Volkswagen* of *Gray v. American Radiator & Standard Sanitary Corp.,* 22 Ill.2d 432, 176 N.E.2d 761 (1961):

> [I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its products in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce

> with the expectation that they will be purchased by consumers in the forum State. (Citation omitted).
>
> *World-Wide Volkswagen,* 444 U.S. at 297-98, 100 S.Ct. at 567.

Nelson by Carson v. Park Industries, Inc., 717 F.2d at 1125.

Despite the Petitioner's statements in their brief to the contrary, those undisputed portions of the record alone require a finding of personal jurisdiction under the opinion of the Court in *World-Wide Volkswagen.* The sole relevant dispute in the record, i.e., whether United Garment from 1973 through 1977 manufactured all 100% boy's cotton flannel shirts for Woolworth intended for resale in the United States or simply the 4,300 dozen of which one allegedly caused injury to the plaintiff is not necessarily determinative of jurisdiction. Nevertheless it must, in fact, be resolved in favor of Woolworth and the plaintiffs. 717 F.2d at 1123.

In an attempt to show that the opinion of the Seventh Circuit conflicts with those of other courts of appeals on the same matter, the Petitioner has cited cases from the Fifth, Sixth, Seventh, Ninth and Tenth Circuits. United Garment contends that each of these cases stands for their proposition that foreign manufacturers cannot be subject personally to jurisdiction in the United States without having directly participated in a distribution system aimed at the United States market.

None of the cases cited by United Garment stands for any proposition except that, prior to upholding jurisdiction, the defendant's conduct, knowledge, expectation and financial benefit gained from the marketing of its goods must be examined. In *Oswalt v. Scripto, Inc.,* 616 F.2d

191 (5th Cir. 1980), the Court found that the existence of a distribution agreement involving a nation-wide market evidenced the Japanese defendant's expectation that their cigarette lighters would reach a particular state that comprised a part of that market. Tokai-Seiki KK contended that it had no contacts whatsoever with the State of Texas or the United States. The Court held, however, as did the Court below, that the Affidavits indicated an expectation or reason to know, on the defendant's part, that their product would be retailed in Texas. 616 F.2d at 198.

In the instant case, the existence of undisputed evidence substantiating United Garment's knowledge and expectation that the shirts they manufactured under the "Topsall" label would be marketed throughout the United States led the Seventh Circuit through the same reasoning to an identical result.

Although some of the Petitioner's remaining cases do discuss the relevance of participation in a distribution network, e.g., *Poyner v. Irma Worke Gimbel GmbH,* 618 F.2d 1186 (6th Cir. 1980), *cert. denied,* 449 U.S. 841 (1980), *Fisons, Ltd. v. United States,* 458 F.2d 1241 (7th Cir. 1972), *cert. denied,* 405 U.S. 1041 (1972), *Duple Motor Bodies, Ltd. v. Hollingsworth,* 417 F.2d 231 (9th Cir. 1969) and *Shank v. Westland Equipment and Parts Co.,* 668 F.2d 1165 (10th Cir. 1982), each case stands for the same proposition as *Oswalt.* It is interesting to note that since the Ninth Circuit's holding in *Duple Motor Bodies, Ltd.* that Court has found jurisdiction in *Raffaele v. Compagnie Generale Maritime,* 707 F.2d 395 (9th Cir. 1983), and *Hedrick v. Daiko Shoji Co., Ltd., Osaka,* 715 F.2d 1355 (9th Cir. 1983), where the defendants had no control, participation or direct contact with the forum in which jurisdiction was sought. Instead, evi-

dence entirely separate and distinct from allegations of control over a distribution network was held to support a finding of personal jurisdiction.

It was established in *World-Wide Volkswagen* that the critical determination is whether the defendant over whom jurisdiction is sought placed goods into a stream of commerce that it knew or had reason to know would lead to the forum where the plaintiff was injured. United Garment did place its goods into a stream of commerce that, without question, it knew led directly to the entire United States market. United Garment should have known that the State of Wisconsin is part of that market. Had United Garment controlled or participated directly in Woolworth's United States retailing operation, that participation would have been a jurisdictionally significant factor. The lack of direct participation, however, is not jurisdictionally fatal if other evidence reveals the defendant's knowledge and expectation. In claiming that direct participation in a distribution network is a critical and necessary factor for a finding of jurisdiction, United Garment is seeking, understandably, to serve the United States market with its products while remaining shielded from its Courts through a structure of business relationships. This is contrary to the holdings of each case cited and particularly to *World-Wide Volkswagen,* wherein it is stated:

> The Due Process Clause, by insuring the "orderly administration of the laws," (citation omitted), gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

World-Wide Volkswagen Corp. v. Woodsen, 444 U.S. at 297. United Garment did structure its conduct to utilize Woolworth's retail distribution network as an outlet for its products on a national retail level in the United States deriving a substantial economic benefit from this conduct. Accordingly, under established and uncontradicted principles involving the protections extended by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, United Garment can be held responsible for its actions in the courts of the State of Wisconsin.

Without explanation, United Garment also suggests that the requirements of Supreme Court Rule 17(c) may be met insofar as the instant case involves: (1) a manufacturer; (2) an international distribution system "dominated by a giant international conglomerate middle-marketer"; and (3) a defendant whose sole contact with the United States was a "mere awareness of the giant marketer's retail system". Without extensive comment: United Garment's first point would have relevance only in support of jurisdiction, the manufacturer being at the start of a distribution system; their second is immaterial insofar as United Garment expected their goods to be marketed specifically in the United States; and their third statement is a distortion of United Garment's knowledge and conduct in this case.

The Petitioner contends that the foreign sovereignty discussed in *Insurance Company of North America v. Marina Salina Cruz,* 649 F.2d 1266 (9th Cir. 1981), is significant to the issue of personal jurisdiction. In this regard, it is noteworthy that the Court in *Insurance Company of North America* specifically discussed the relevance of foreign sovereignty insofar as the Marina Salina Cruz was 100% owned by the Mexican government.

Governmental interest or ownership has not been demonstrated with regard to United Garment. Moreover, there is no indication in the record of this case that the government of the British Crown Colony of Hong Kong has ever expressed any indication or desire to exercise jurisdiction over an issue that has arisen during the course of this litigation.

The Petitioner also suggests that the plaintiffs can get full relief from Woolworth and that if Woolworth can travel to Hong Kong to purchase goods for resale in the United States, it can also travel to Hong Kong to litigate claims for contribution. Aside from the fact that these contentions are devoid of jurisdictional materiality, neither is necessarily true. In *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 729 (Minn. 1980), *cert. denied,* 449 U.S. 921 (1980), a jury verdict was upheld which found cotton flannel pajamas that ignited causing injury to be defective when it left the control of the manufacturer and that this defect caused the plaintiff's injuries. The jury found, however, that although the pajamas remained defective when they left intermediaries in the stream of commerce, those defects did not cause the plaintiff's injuries. Lastly, any claim for contribution would necessarily be based upon a strict liability theory and the Petitioner has presented no evidence or support, outside of its bare statement, that the Courts of Hong Kong even recognize a remedy for contribution based on strict liability in tort.

• • •

In their brief, the Petitioner has raised the issue of whether the United States Court of Appeals should have accepted review of the District Court's dismissal orders. While the decision of the Court was not issued until September 16, 1983, the decree over which United Garment now seeks review was rendered on April 7, 1983. (Petitioner's Brief at App. 8). United Garment's petition seeking review of the April 7th Order was not filed until December 10, 1983. It was not received by the Respondents until December 12, 1983.

Under Supreme Court Rule 20.4: "The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate. . .". Under Rule 20, if a request for a rehearing is timely filed, the time for filing a Petition will run from the date of a denial of that request. In the instant case no rehearing was requested following the April 7th Order and United Garment's Petition with regard to that Order is not timely and should not be considered by the Court.

With regard to the merits respecting the issue of the Seventh Circuit's ability to review the District Court orders, apparently the Petitioner feels that this decision demonstrates a conflict with rulings of other courts of appeals on the same matter and that this makes review of the April 7th Order appropriate under Supreme Court Rule 17(a).

In support of this contention a number of cases are cited from which it is claimed that the case of *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), has never been used to exercise jurisdiction over an Order dismissing some but not all parties except in unusual circumstances. (Petitioner's Brief at 8). In contending, how-

ever, that *Gillespie* has never been used, one way or the other, by another circuit court in the same way the Seventh Circuit utilized that decision, the Petitioner has not demonstrated that the use of that decision in the instant case is in conflict with another decision by a court of appeals on the same matter.

In *Gillespie v. United States Steel Corp.*, 321 F.2d 518 (6th Cir. 1963), the Sixth Circuit held that under the circumstances of that case a decision on the merits was, in fact, a final order despite its technical deficiencies insofar as the immediate appeal saved considerable time, expense and effort without creating any additional stress on the judicial machinery. 321 F.2d at 520-521 n.1, 522.

The Supreme Court of the United States affirmed. 379 U.S. 148. Mr. Justice Black, speaking for the court stated:

> . . . our cases long have recognized that whether a ruling is "final" within the meaning of §1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality. Because of this difficulty, this Court has held that the requirement of finality is to be given a "practical rather than a technical construction".

Gillespie v. United States Steel Corp., 379 U.S. at 152. The Court stated that the most important competing considerations in deciding the question of finality were "the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other." 379 U.S. at 152-153, *quoting, Dickinson v. Petroleum Conversion Corp.*, 388 U.S. 507, 511 (1950).

In evaluating the competing considerations in *Gillespie*, Mr. Justice Black declared:

> Such competing considerations are shown by the record in the case before us. It is true that the review of this case by the Court of Appeals could be called "piecemeal"; but it does not appear that the inconvenience and cost of trying this case will be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered. We cannot say that the Court of Appeals chose wrongly under the circumstances. And it seems clear now that the case is before us that the eventual cost, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided. Moreover, delay of perhaps a number of years in having the brother's and sisters' rights determined might work a great injustice on them. . . .

Gillespie v. United States Steel Corp., 379 U.S. at 153. The Court noted that in *United States v. General Motors Corp.*, 323 U.S. 373 (1945), it had reviewed a trial court's refusal to permit proof of certain damaged items in a case not fully tried because the ruling was "fundamental to the further conduct of the case." *Id., quoting* 323 U.S. at 377. Finally, Mr. Justice Black found that, although the District Court had refused to issue a Section 1292(b) certificate, "the Court of Appeals properly implemented the same policy Congress sought to promote in §1292(b) by treating this obviously marginal case as final and appealable under 28 U.S.C. §1291 . . .". 379 U.S. at 154.

The *Gillespie* rule is one of limited applicability. In *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 n.30 (1978), the Court pointed out that the *Gillespie* rule

should not be "extended beyond the unique facts of that case, (since) §1291 would be stripped of all significance." The Court pointed out that in *Gillespie* the marginally final order disposed of an unsettled issue of national significance and that the finality issue had been raised at such a time so as to ensure that "none of the policies of judicial economy served by the finality requirement would be achieved were the case sent back with the important issue undecided." *Id.*

In the present case, the Seventh Circuit was in accord with *Gillespie* and correct in asserting appellate jurisdiction over the two orders dismissing United Garment and Bunnan Tong for lack of personal jurisdiction. The question presented for review, although discussed in *World-Wide Volkswagen* and not in conflict with the decisions of other courts of appeals, was fundamental to the further conduct of this case. The jurisdictional question is fundamental to the further conduct of the case because United Garment and Bunnan Tong are critical parties in the stream of commerce and are both potentially liable along with Woolworth to the plaintiffs. Review of the question by the Seventh Circuit implemented the same policy Congress sought to promote in §1292(b).

None of the policies of judicial economy served by the finality requirement would be achieved were the Court to reverse and vacate the Seventh Circuit's decision in this case. The question was fully briefed and argued and correctly decided below. Reversal for lack of finality would defeat the purposes behind the final judgment rule. Most importantly, the Seventh Circuit was correct in determining that the danger of denying justice by delay in this case outweighed the competing considerations of

inconvenience and costs of piecemeal review. Several factors present in this case lead to this conclusion. The question presented here would ultimately have been heard on appeal after a final judgment but at considerable expense and irreparable harm to both the plaintiffs and Woolworth. The likelihood that the order from which the appeal is sought will be reversed must also be considered by a court in applying *Gillespie*. In this case, the District Court had clearly erred in applying *World-Wide Volkswagen*.

Those orders dismissing Bunnan Tong and United Garment were for all purposes final. The Court expressed a refusal to entertain requests under Section 1292(b) and despite repeated claims from all remaining parties, particularly the plaintiffs, of hardship and actual harm by the refusal to enter judgment, the Court declined to do so.

The Order of April 7, 1983 is limited to the unique facts which represent the procedural history of this case. Further review of that Order will serve only to frustrate and undermine the judicial process with regard to all outstanding claims in this action.

CONCLUSION

The Petitioner has failed to demonstrate either a conflict among courts of appeals on the same matter or the existence of an important question of federal law which has not been but should be settled by the Court. Accordingly, it is requested that their Petition for the issuance of a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX OF RESPONDENTS

EXCERPTS FROM DEPOSITION OF SHERRY NELSON CONDUCTED ON JULY 7, 1982

Sherry Nelson, having been first duly sworn, testified as follows:

(Adversely examined by Mr. Crivello)

[Page 27]

Q. Can you tell me how long Telinda had had this shirt before this incident occurred? A. It was bought in December and she received it for Christmas so by the time the accident happened it would have been about ten months.

Q. I have indicated that it was purchased on December 4 of '77? A. I'm not sure about the date, but it was the first weekend of December.

* * *

[Page 31]

Q. Did you know when you went into Woolworth's what you were going to buy? A. No.

Q. What made you decide, if anything, other than possible need to get a shirt for Teli? A. We saw them there. They had a sale on them and it was a good buy and we decided because we camp a lot and because the evenings are chilly and so forth we decided to buy flannel shirts.

Q. And they were on sale? A. Yes.

Q. Did you first become aware of that when you got into the store and you saw this counter sale and you went over there? A. Yes.

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Q. And you go camping a lot so a heavier shirt would be good for Teli? A. Right.

Q. Okay. Can you tell me where this counter was located in relation to any entrances to that store? A. It would have been close to the mall entrance in the children's section.

* * *

[Page 33]

Q. The Woolworth's store carries many different items, is that correct? A. Correct.

Q. Can you tell me how large that counter was? A. No, I can't.

Q. When you say it was a counter, was it a display counter, was it a display window? What type of counter was it? A. What do you mean by display counter?

Q. Were a number of shirts or a number of items on the counter

[Page 34]

or was this the only one on there or were there just a couple of them on there? A There were several on the counter on the top.

Q. Several shirts? A. Yes.

Q. Was there any other item other than this type of shirt on that counter? A. No.

Q. Were there any signs on the counter? A. Only a sale sign.

* * *

[Page 35]

Q. Okay. How many shirts did you buy that day from that particular counter? A. I bought two.

Q. And for whom? A. I bought one for Staci and one for Teli.

Q. All right. Do you know if the shirt you bought that day for Staci was the one she had on on the date or if she had that one on on the date this incident occurred? A. I don't recall what shirt she had on that day.

Q. Were these shirts in packages or were they folded not in

[Page 36]
packages? What was the situation? A. They were folded in a cellophane package of some sort.

Q. Could you see obviously through the cellophane? A. Yes.

Q. Okay. Did the cellophane have any printing on it? A. Yes, it did.

Q. What did it say? A. I don't recall exactly.

Q. Do you recall whether the printing was large or small? What can you tell me about the printing? A. All I can recall is that it was written at an angle. It was in a print and it was white.

Q. The package was cellophane? A. Yes.

Q. There was printing on it as opposed to writing on it? A. Yes.

Q. And the printing was in white? A Yes.

Q. Anything else — strike that. You say it was on a diagonal? A. Yes.

Q. How do you know that that is the shirt that Teli had on on the date of this incident? A. Because of the accident I remember it.

Q. Anything else that leads you to the conclusion that the shirt Teli had had on on the date of this occurrence

[Page 37]

was the one you purchased in the first week of December, '77? A. Yes. My girlfriend was there and bought shirts of the same type.

* * *

Q. Do you recall what size shirt you bought that day or what

[Page 38]

size shirts? You say you bought two of them. What sizes were those shirts? A. I bought a size 8 and a size 10.

Q. Did you give that shirt to Teli for Christmas? A. Yes, I did.

* * *

Q. What do you remember about looking for sizes? A. Just that I found the size that would fit them the closest. Eventually they would grow into them so I went ahead and bought them anyway.

Q. What sizes — or strike that. Was the size 10 that you purchased off of this same counter? A. Yes.

Q. So the 8 and 10 were both there?

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A. Yes.

Q. Were there any other sizes on that counter? A. I remember they went up to size 14.

* * *

Q. How many labels, if more than one, were you able to visualize when you were shopping for this shirt? A. Only one.

Q. Would that be the tag on the back of the neck? A. Yes.

Q. How large was that tag? A. I don't know.

* * *

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Q. Do you remember anything else about that label that was either written on it that you saw that you remember now? A. I remember the name "Tops All" or "Top All" printed on it.

Q. Do you know what color that was in? A. No, I don't.

Q. Were the labels on the size 8 and the size 10 identical except for size designations? A. As far as I can remember they were.

* * *

[Page 43]

Q. Did your girlfriend, did you say she bought some shirts off the same counter? A. Yes.

Q. Do you recall how many she purchased?

[Page 44]

A. She bought four.

Q. Do you recall what sizes they were? A. No, I don't.

Q. Were they for her children? A. For her son.

* * *

Q. When you opened the shirt at Christmas time, were you able to determine if there were any other labels other than this

[Page 45]

one that you recall and have told us about? Were there any other labels in the shirt anyplace? A. Not that I recall.

Q. None at all? A. Not that I recall.

Q. Okay. How about a laundering tag? A. It's possible, but I don't remember.

Q. You just don't remember any others than this one? A. I don't.

Q. Is that correct? A. Correct.

Q. Did Teli wear this shirt from the Christmas time throughout the winter season? A. Yes.

Q. Can you tell me approximately how many times she wore that shirt before this incident occurred? A. I can't tell you. They just wore it whenever the weather needed it, warranted it.

Q. The weather through — A. Through the wintertime.

* * *

AFFIDAVIT OF NAI YAN CHAN

[*Venue and caption omitted*]

I, Nai Yan Chan, being first sworn on oath, depose and state as follows: —

(1) That I have been a Director of Bunnan Tong and Company Limited of Hong Kong (hereinafter called "the Company") since 1974 and I was a director of the Company on or about October 28, 1978 and still am a director of the Company.

(2) That I make this affidavit based upon my personal knowledge or after a review of the records of the Company which are kept in the ordinary course of business.

(3) That the Company is duly incorporated under the laws of Hong Kong and is an exporter and agent for foreign buyers of general merchandise

including but not limited to textile products manufactured in Hong Kong and other South East Asian countries.

(4) That the Company has never been licensed to do business in the State of Wisconsin.

(5) That the Company does not own any real or personal property within the State of Wisconsin.

(6) That the Company does not employ any individuals within the State of Wisconsin.

(7) That the Company does not maintain any office in the State of Wisconsin

(8) That the Company has never had any agents, sales persons, distributers or advertised in the State of Wisconsin.

(9) That the Company has never made any business calls to any contacts in the State of Wisconsin.

(10) That the Company has never had any advertising done on its behalf in the State of Wisconsin to solicit business.

(11) That F. W. Woolworth Company is not nor has it ever been the Company's agent or representative in the State of Wisconsin.

(12) That the Company has never serviced any of its products in the State of Wisconsin.

(13) That the Company acted as the buying representative of F. W. Woolworth Company in Hong Kong whose staff came to Hong Kong to place orders for shirts carrying label "TOPSALL" (hereinafter called "the said goods") with the Company in early 1976. The Company then pur-

chased the said goods on behalf of F. W. Woolworth Company at an agreed commission from United Garment Manufacturing Company Limited of 1151-1153 Canton Road, First Floor, Hong Kong, F.O.B. Hong Kong.

(14) That the said goods were delivered by the Company to WESTERN NAVIGATION (FAR EAST) LIMITED, formerly of Nos. 15-19, Ha Heung Road, 6th floor, To Kwa Wan, Kowloon presently of Rooms 712-715, world Commerce Centre, 11 Canton Road, Tsimshatsui, Kowloon, forwarders in Hong Kong nominated by F. W. Woolworth Company, who in turn on the instructions of F. W. Woolworth Company arranged to have the said goods shipped to New York, Boston, Philadelphia, San Francisco and Los Angeles. None of the said goods were shipped directly to anywhere in the State of Wisconsin.

(15) That the Company has not done anything with the goods in question to prepare them for sale.

(16) That physical control and custody of the said goods passed to F. W. Woolworth Company once the said goods were delivered over the rail of the vessel sailing to the United States.

(17) That F. W. Woolworth Company paid for the insurance and the cost of shipping the said goods from Hong Kong to their destinations in the United States.

(18) That the Company has never received any direct benefit or protection as a result of laws of the State of Wisconsin in the course of its business.

(19) That the Company has never been involved in a suit in the State of Wisconsin, either as a plain-

tiff or a defendant, or submitted to the jurisdiction of the Wisconsin Courts.

(20) That there was no service of summons upon the Company within the State of Wisconsin.

(21) That the Company received the Summons and Complaint in Hong Kong.

/s/ Nai Yan Chan

Nai Yan Chan

Subscribed and sworn to before me this
17th day of August, 1982.

/s/ Kenneth Lo

Notary Public, Hong Kong

KENNETH LO
Notary Public
Hong Kong

AFFIDAVIT OF PETER CHOI

[*Venue and caption omitted*]

I, Peter Choi, being first duly sworn, depose and state as follows:

1. I have been a director of United Garment Manufacturing Company, Ltd., of Hong Kong (hereinafter "the Company") since 1976; that I was a director of the Company on or about October 28, 1978; and that I currently am one of three directors of the company.

2. I make this affidavit based upon my personal knowledge or after a review of the records of the Company which are kept in the ordinary course of business.

3. The Company was organized as a limited liability company in Hong Kong in 1957 and is presently duly incorporated under the laws of Hong Kong. The Company manufactures textile products in Hong Kong.

4. The Company is not now licensed and has never been licensed to do business in the state of Wisconsin, or elsewhere in the United States.

5. The Company does not now own and has never owned any real or personal property within the state of Wisconsin or elsewhere in the United States.

6. The Company does not now employ and has never employed any individuals within the state of Wisconsin or elsewhere in the United States.

7. The Company does not now maintain and has never maintained any office in the state of Wisconsin or elsewhere in the United States.

8. The Company has never had any agents, representatives, employees, sales persons or distributors in the state of Wisconsin or elsewhere in the United States.

9. Neither the Company nor any representative of the Company has ever made any business trips or calls to anyone in the state of Wisconsin or elsewhere in the United States.

10. The Company has never had any advertising done on its behalf to solicit business in the state of Wisconsin or elsewhere in the United States.

11. Neither F. W. Woolworth Company nor Bunnan Tong and Company, Ltd. ("Bunnan Tong") are now nor ever have been the Company's agent or representative in the state of Wisconsin or elsewhere in the United States.

12. The Company has never serviced any products in the state of Wisconsin or elsewhere in the United States.

13. The Company sold certain "Topsall" shirts to Bunnan Tong in Hong Kong with deliveries to Bunnan Tong in Hong Kong in early 1977. Other than these deliveries, the Company never sold "Topsall" shirts.

14. Thereafter, the Company had nothing further to do with or further interest in the "Topsall" shirts sold to Bunnan Tong.

15. The Company has never received any direct benefit or protection as a result of the laws of the state of Wisconsin in the course of its business.

16. The Company has never been involved in a suit in the state of Wisconsin, either as a plaintiff or a defendant, or submitted to the jurisdiction of the Wisconsin courts.

17. There was no service of summons upon the Company within the state of Wisconsin.

18. The Company received the summons and complaint in this action in Hong Kong.

DATED: November 12, 1982

/s/ Choi

Peter Choi For Wing

Consulate General of the)
United States of America) SS:
at Hong Kong)

Subscribed and sworn to before me this 12th day of November, 1982.

/s/ Barbara Tobias

Barbara Tobias
American Consul

AFFIDAVIT OF CHARLES W. TURNER
(Turner Affidavit I)

[*Venue and caption omitted*]

STATE OF NEW YORK :
: SS.
COUNTY OF NEW YORK:

CHARLES W. TURNER, being first duly sworn, states as follows:

1. Your affiant presently holds the position of Buyer of Men's Shirts for F. W. Woolworth Company of the United States; Your affiant has held this position for the past 15 years and has been an employee of F. W. Woolworth Company of the United States for the past consecutive 42 years.

2. For a period commencing in 1972 and ending in 1982, your affiant has conducted personal business dealings in Hong Kong, with Bunnan Tong & Company, Ltd., dealing personally and directly with Nai Yan Chan, a director of said company, and T. K. Tong, the owner and managing director of said company; said dealings with Bunnan Tong & Company, Ltd., and the above-stated persons, centered around F. W. Woolworth Company's use of the services of Bunnan Tong & Company, Ltd., as a middleman for the purchase of shirts, in bulk, for sale at Woolworth's retail stores throughout the United States.

3. F. W. Woolworth Company of the United States has dealt regularly and extensively with Bunnan Tong & Company, Ltd., as a broker and importer of men's shirts and other merchandise, since the end of World War II; In addition to dealing with F. W. Woolworth Company of the United States, Bunnan Tong & Company, Ltd.,

has also, since the end of World War II, engaged in extensive business dealings, on a similar basis, with F. W. Woolworth Company of Canada, United Kingdom and West Germany.

4. In your affiant's personal dealings and meetings with T. K. Tong over the years, Mr. Tong has expressed and indicated detailed familarity with the scope and extent of F. W. Woolworth Company's operations on an international scale.

5. During the late 1960's and early 1970's, before your affiant made yearly trips to Bunnan Tong & Company, Ltd., in Hong Kong, both T. K. Tong and Nai Yan Chan made periodic business visits to the corporate offices of F. W. Woolworth Company in New York City.

6. Both T. K. Tong and Nai Yan Chan, during the years I dealt personally with them, were fully aware that F. W. Woolworth Company retailed the shirts purchased via Bunnan Tong & Company, Ltd., throughout the United States.

/s/ Charles W. Turner

CHARLES W. TURNER

Subscribed and sworn to before me
this 6 day of December, 1982.

/s/ Lillian M. Schultz

Notary Public, State of New York

My Commission: 3/30/83

LILLIAN M. SCHULTZ
Notary Public, State of New York
No. 0632300
Qualified in Kings County
Commission Expires March 30, 1983

AFFIDAVIT OF CHARLES W. TURNER
(Turner Affidavit II)

[Venue and caption omitted]

STATE OF NEW YORK :
: SS.
COUNTY OF NEW YORK:

CHARLES W. TURNER, being first duly sworn, states as follows:

1. Your affiant presently holds the position of Buyer of Men's Shirts for F. W. Woolworth Company of the United States; Your affiant has held this position for the past 15 years and has been an employee of F. W. Woolworth Company of the United States for the past consecutive 42 years.

2. For a period commencing in 1972 and ending in 1982, your affiant has conducted personal business dealings in Hong Kong, with Bunnan Tong & Company, Ltd., dealing personally and directly with Nai Yan Chan, a director of said company, and T. K. Tong, the owner and managing director of said company; said dealings with Bunnan Tong & Company, Ltd., and the above-stated persons, centered around F. W. Woolworth Company's use of the services of Bunnan Tong & Company, Ltd., as a middleman for the purchase of shirts, in bulk, for sale at Woolworth's retail stores throughout the United States.

3. For a period of approximately four to five years, from 1973 through 1977, United Garment Manufacturing Company, Ltd., hereinafter referred to as United Garment, was the exclusive manufacturer of all 100% cotton flannel boy's shirts purchased by F. W. Wool-

worth Company of the United States, through their broker and importer, Bunnan Tong & Company, Ltd.,

4. During said four to five year period, your affiant visited the premises of United Garment in Hong Kong at least once each year, and on these visits, had personal dealings with the owner of the company, and primarily with one of the directors of the company, Peter Choy For Wing

5. United Garment manufactured boy's 100% cotton flannel shirts specifically for Woolworths, during said years, under the Topsall label; Topsall was Woolworth's label during said years, and United Garment had full knowledge of this fact, and actually, manufactured the Topsall label on Woolworth shirts for Woolworth.

6. Peter Choy For Wing was fully aware that the shirts United Garment manufactured under the Topsall label for Woolworth would be imported into the United States and sold at Woolworth retail outlets throughout the United States.

7. During said years when United Garment manufactured shirts under the Topsall label for Woolworth, United Garment also manufactured shirts under labels for other American distributors and retailers, including specifically, Men's Wear International, a division of Van Heusen, and Montgomery Ward.

8. Because of the nature of the labor market in the textile industry, for at least the last 10 years, 85% to 90%

of all cotton flannel shirts sold in the United States have been manufactured outside of the United States.

/s/ Charles W. Turner

CHARLES W. TURNER

Subscribed and sworn to before me
this 6 day of December, 1982.

/s/ Lillian M. Schultz

Notary Public, State of New York

My Commission: 3/30/83

LILLIAN M. SCHULTZ
Notary Public, State of New York
No. 0632300
Qualified in Kings County
Commission Expires March 30, 1983